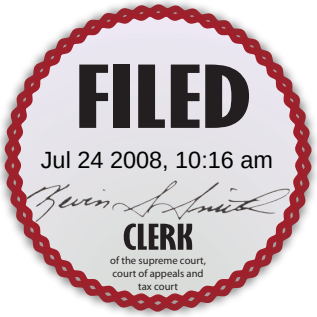

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IN THE COURT OF APPEALS OF INDIANA

JEFFREY S. MORRIS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 84A05-0712-CR-670
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE VIGO SUPERIOR COURT
The Honorable Michael J. Lewis, Judge
Cause No. 84D06-0701-FA-243

July 24, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

After Jeffrey S. Morris pled guilty to one count of child molesting as a Class A felony, the trial court sentenced him to forty years in the Department of Correction. On appeal, Morris contends that the trial court abused its discretion in imposing an enhanced sentence and that his sentence is inappropriate. The trial court properly recognized his position of trust with the victim and the nature and circumstances of the offense as aggravators. The trial court also did not abuse its discretion in failing to recognize Morris's remorse and guilty plea as significant mitigating factors and in weighing the aggravating and mitigating circumstances. We also conclude that Morris's forty-year sentence is not inappropriate. We affirm.

Facts and Procedural History

Morris met H.M. when she was ten years old. At that time, he was dating H.M.'s mother, L.M., and had moved in with L.M. and H.M. in Terre Haute, Indiana. Morris began teaching H.M. about motorbike racing, a pastime of his when he was a child, and bought a motorbike for her.

In the fall of 2001, shortly after H.M.'s eleventh birthday, Morris took her to Casey, Illinois, to watch a motorcycle race. The trip was an overnight one, and Morris brought one tent for the two of them to share. After H.M. and Morris set up their campsite, H.M. was sitting down and Morris approached her with some pornographic magazines and told her to look at them. She flipped through them. Thereafter, in the tent, Morris asked H.M. whether she would like to try the activities that she had seen in the magazines. When H.M. initially refused, Morris told her that he anticipated that she

would tell her mother what he did and that he would have to either sell all of his belongings and run away or be jailed. Morris then kissed H.M. and engaged in vaginal and oral sex with her.

Morris again engaged eleven-year-old H.M. in sexual intercourse upon returning to Terre Haute. He proceeded to have sexual contact with her two or three times per week for over five years, until January 2007, when H.M. was sixteen years old. Over time, Morris's sexual contact with H.M. progressed beyond the initial vaginal and oral sex. When H.M. was approximately twelve years old, Morris began to have anal intercourse with her. Around that time, he also introduced adult toys into his encounters with H.M. Morris purchased "skimpy outfits" for H.M. to wear, whips, and restraint ropes. Sent. Tr. p. 69. He also began videotaping some of the sexual encounters. Morris told H.M. that if she told anyone he would kill himself and his death "would be on [her] hands." *Id.* at 64.

In January 2007, H.M. told Morris that she was "done." *Id.* at 65. In response, Morris took a rope noose that he had already made out to his garage and informed H.M. that she was going to watch him kill himself. This scared H.M., and she cried. It is unclear from the record what stopped Morris from harming himself. Around this time, H.M. disclosed the abuse to a friend. The friend's mother convinced H.M. to tell L.M. and the police.

Police obtained and executed a search warrant for Morris's home and found the videotapes and sex toys. They then located and arrested Morris, who confessed in a recorded interview. The State charged Morris with three counts of child molesting as a

Class A felony,[1] two counts of sexual misconduct with a minor as a Class B felony,[2] and one count of possession of child pornography, a Class D felony.[3] Morris pled not guilty, and the case proceeded to jury trial. However, after jury selection commenced, Morris decided to plead guilty pursuant to a plea agreement reached with the State. Under the terms of the plea agreement, Morris pled guilty to one count of child molesting as a Class A felony for offenses committed against H.M. between September 14, 2001, and September 13, 2002, and the State dismissed the remaining charges. Appellant's App. p. 11. The agreement left sentencing open to the trial court. *Id.*

After a sentencing hearing during which witnesses were called and the State and Morris presented arguments, the trial court sentenced Morris to forty years in the Department of Correction. In reaching this sentencing decision, the trial court identified the following aggravating circumstances: Morris's position of trust with H.M. and the circumstances of the offense, specifically Morris's manipulation and grooming of H.M. Sent. Tr. p. 101-02. The trial court also identified one mitigating circumstance, Morris's lack of criminal history, but found that the aggravators far outweigh this mitigator. *Id.* at 101. Morris now appeals.

[1] Ind. Code § 35-42-4-3(a)(1).

[2] Ind. Code § 35-42-4-9(a)(1).

[3] Ind. Code § 35-42-4-4(c).

Discussion and Decision

Morris challenges his sentence on appeal. We break his challenge down into six components.[4] First, he argues that the trial court abused its discretion in recognizing his position of trust with H.M. as an aggravating circumstance. Second, he contends that the trial court erred in finding the circumstances of the offense aggravating, characterizing the court's emphasis as being upon the age difference between him and his victim. Third, Morris argues that the trial court should have found his remorse to be mitigating. Fourth, he contends that the trial court abused its discretion in failing to recognize his guilty plea as a significant mitigator. Fifth, he argues that the trial court erred in weighing the aggravating and mitigating circumstances. Finally, he claims that his sentence is inappropriate.

When Morris committed his offense between 2001 and 2002, Indiana Code § 35-50-2-4 provided: "A person who commits a Class A felony shall be imprisoned for a fixed term of thirty (30) years, with not more than twenty (20) years added for aggravating circumstances or not more than ten (10) years subtracted for mitigating circumstances."[5] Under the terms of Morris's plea agreement, the trial court could

[4] The State's brief restates the issues as one: whether Morris's forty-year sentence is inappropriate in light of the nature of the offense and his character, incorporating Morris's arguments about the aggravators and mitigators into the Indiana Appellate Rule 7(B) paradigm. Whether a trial court has abused its discretion in finding or weighing (under the presumptive sentencing scheme) aggravators or mitigators and whether a sentence imposed is inappropriate pursuant to Appellate Rule 7(B) are distinct analyses. *See Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007).

[5] The briefs in this case reflect some confusion about the sentencing scheme under which Morris was sentenced. Both the State and the defendant refer to Morris's term of forty years as being above the "advisory" sentence for a Class A felony. Appellant's Br. p. 1, 5, 6; Appellee's Br. p. 5. Between the dates of Morris's offense, September 2001 through September 2002, and the date of sentencing in this case, October 29, 2007, the Indiana General Assembly replaced the former presumptive sentencing

impose any lawful sentence for a Class A felony. Appellant's App. p. 11. The plea agreement also provided that Morris waived his right to have a jury find aggravating factors beyond a reasonable doubt and allowed the trial court to determine aggravating circumstances. *Id.* Thus, the trial court had the discretion to recognize valid aggravating circumstances and impose any sentence between twenty years and fifty years. Upon identifying in aggravation Morris's position of trust with H.M. and the circumstances of the offense, specifically Morris's manipulation and grooming of H.M., and in mitigation Morris's lack of criminal history, the court balanced these considerations and found that the aggravators far outweigh the mitigator. Sent. Tr. p. 101-02. The trial court then sentenced Morris to forty years, ten years above the presumptive sentence for a Class A felony.

In general, sentencing decisions lie within the discretion of the trial court. *Henderson v. State*, 769 N.E.2d 172, 179 (Ind. 2002). As such, we review sentencing decisions only for an abuse of discretion, including whether to increase or decrease the presumptive sentence because of aggravating or mitigating circumstances, *id.*, or to run the sentences consecutively due to aggravating circumstances, *Deane v. State*, 759 N.E.2d 201, 205 (Ind. 2001). An abuse of discretion occurs when the decision is "clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom." *K.S. v. State*, 849 N.E.2d 538, 544 (Ind. 2006) (quotation omitted). When a court identifies aggravating or mitigating

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scheme with the current advisory sentencing scheme. *See* P.L. 71-2005 (eff. Apr. 25, 2005). Nonetheless, because the "sentencing statute in effect at the time a crime is committed governs the sentence for that crime," *Gutermuth v. State*, 868 N.E.2d 427, 431 n.4 (Ind. 2007), we address Morris's sentence under the former presumptive sentencing scheme.

circumstances, it must provide a statement of its reasons for selecting the sentence imposed. *Jackson v. State*, 728 N.E.2d 147, 154 (Ind. 2000). This statement of reasons must include the following:

> (1) identification of all significant mitigating and aggravating circumstances; (2) the specific facts and reasons that lead the court to find the existence of each such circumstances; and (3) reflection of an evaluation and balancing of the mitigating and aggravating circumstances in fixing the sentence.

Id. Additionally, even where a trial court has followed the proper procedure in imposing sentence, we "may revise a sentence . . . if, after due consideration of the trial court's decision, [we] find[] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B). *See Childress v. State*, 848 N.E.2d 1073, 1079-80 (Ind. 2006).

I. Position of Trust

Morris first contends that the trial court abused its discretion in identifying his position of trust with his victim as an aggravating circumstance. Acknowledging that he dated H.M.'s mother, L.M., and lived for a period of time with L.M. and H.M., Morris nonetheless argues that he was not in a position of trust with H.M. We disagree.

A defendant's position of trust with a victim is a valid aggravating circumstance. *Bacher v. State*, 722 N.E.2d 799, 802 n.5 (Ind. 2000). This aggravator "applies in cases where the defendant has a more than casual relationship with the victim and has abused the trust resulting from that relationship." *Rodriguez v. State*, 868 N.E.2d 551, 555 (Ind. Ct. App. 2007). This Court has expressly found that "a live-in boyfriend is in a position of trust with regard to the children of his live-in girlfriend." *Brown v. State*, 760 N.E.2d

243, 246 (Ind. Ct. App. 2002) (citing *Martin v. State*, 535 N.E.2d 493, 498 (Ind. 1989); *Davies v. State*, 730 N.E.2d 726, 742 (Ind. Ct. App. 2000), *reh'g denied*, *trans. denied*), *trans. denied*. Additionally, where an individual acts as a caretaker or babysitter for a child and abuses this relationship, the violation of a position of trust is a valid aggravating circumstance. *See Martin*, 535 N.E.2d at 498 (finding no error in recognition of position of trust as an aggravator where the defendant resided with the child victim and served as a babysitter when the victim's mother was away); *Shaffer v. State*, 674 N.E.2d 1, 9 (Ind. Ct. App. 1996), *trans. denied*.

The trial court found Morris's violation of a position of trust to be a significant aggravating circumstance: "The big one's the position of trust. You keep saying parent figure. That you had a parental relationship to her . . . ." Sent. Tr. p. 101. The record supports the trial court's finding. When H.M. was ten years old, Morris began dating H.M.'s mother and living with their family. *Id.* at 58. Shortly after H.M. turned eleven, Morris was entrusted with her for a weekend trip to attend a motorcycle race in Illinois, and while on this camping trip he had vaginal and oral sex with her. *Id.* at 58-62. Even after Morris no longer resided with H.M. and L.M., he continued in a trusted caretaker role for H.M. Morris himself characterized his relationship with H.M. as parental in nature. *Id.* at 25 ("I also had to be a parent figure for things with her. And, her education or school work. I was having to be about three or four people and I'm sure and that those overlapped. Yeah know that, that I might have been yeah, know being controlling about something. Because I was the parent figure or whatever and, and, and to her that probably got interpreted as you know that I was being."). He described himself as "a

father figure" "about eighty percent" of the time that he spent with H.M. *Id.* at 30. The trial court did not abuse its discretion in recognizing Morris's position of trust with H.M. as an aggravating circumstance.

II. Nature and Circumstances of the Offense

Morris next argues that the trial court abused its discretion in finding the nature and circumstances of the offense aggravating. The nature and circumstances of a criminal offense may properly be identified as an aggravating circumstance. *McElroy v. State*, 865 N.E.2d 584, 590 (Ind. 2007). While "a material element of a crime may not be used as an aggravating factor," a trial court may "properly consider the particularized circumstances of the factual elements as aggravating factors." *Id.* at 589-90 (citations omitted). "Generally, this aggravator is thought to be associated with particularly heinous facts or situations." *Id.* at 590 (quotation omitted).

Morris contends that the trial court aggravated his sentence based upon the age difference between him and H.M. and argues that H.M.'s young age was an improper consideration because it is an element of the offense. He also argues that the trial court incorrectly characterized his offense as appalling and aggravated his sentence to send a "personal philosophical" message, which would be improper if true. Appellant's Br. p. 10 (citing *Gibson v. State*, 856 N.E.2d 142, 149 (Ind. Ct. App. 2006)). At the conclusion of Morris's sentencing hearing, the trial court explained its finding of this aggravating circumstance as follows:

> You know after listing [sic] through all of the testimony. Watching the video tapes um, I am just, I am appalled at what I saw. Mr. Morris what you did w[as] take that girl's innocents [sic]. She'll never know what its' [sic] like to go through pre teen years. She'll never know what its' [sic]

> like to have a normal puberty. You've taken that all away from her. And, she and her family will suffer from this for the rest of their lives. Its' [sic] not gonna be a five year thing. From what you put her through. Its' [sic] gonna be the rest of their lives. . . . All though [sic] I would love to throw the book at you, I believe myself under Indiana law I can't do this. . . . [T]here was the manipulation and the grooming and I know your attorney argued that you never hurt her, or threatened her. You did hurt her in a way. She's going, the mental abuse that was put upon this child from eleven to sixteen years of age is overwhelming. Your threats to her that your [sic] gonna kill yourself if any one finds out, I think that is a threat directly to her.

Sent. Tr. p. 99-100, 102. It is clear from the transcript that the trial court did not aggravate Morris's sentence based upon the age of his victim or upon personal philosophical beliefs. Instead, the court considered the particularized facts of Morris's crime, namely, his decision to videotape his sexual offenses against a child, the long-term effect of the offense upon H.M. and her family, and Morris's threats to kill himself if H.M. told anyone about the abuse. The trial court did not abuse its discretion in characterizing these circumstances as appalling. We find no error in this regard.

III. Remorse

Third, Morris contends that the trial court should have found his remorse to be mitigating. On appeal, our review of a trial court's determination of a defendant's remorse is similar to our review of credibility judgments: without evidence of some impermissible consideration by the trial court, we accept its determination. *Pickens v. State*, 767 N.E.2d 530, 535 (Ind. 2002).

At his sentencing hearing, Morris argued that he was remorseful. However, his testimony told a different story. Morris shirked responsibility for his offenses against H.M., placing joint responsibility on her for the sexual encounters. In particular, Morris

informed the trial court that eleven-year-old H.M.'s inquisitiveness "about life in general" predicated the first instance of vaginal and oral intercourse after their conversations became "heated at times and the questions kept getting a little more intense . . . and ah we just kind of talked about it and it happened and it's been happening ever since . . . ." Sent. Tr. p. 13. Characterizing the encounters as a "relationship," Morris told the court that H.M. had been an active participant:

> There's two sides to everything you know that and I know that, and I know what we were doing was wrong, as wrong as wrong could be. And, I know you would find it hard to believe and anybody else would, but a lot what we done was also right here. I mean, she was well a part of that as well. Whether she felt that way all along or not, I can't sit here and speak for her, and I wouldn't even try. Uh, but ya know it was a it was a relationship. I mean is it was a ya know, there was feelings, emotions, this wasn't something that I was doing as uh, some perverted kick uh, for to be with a kid or something. It wasn't like that.

Id. at 25. He also testified at sentencing that he believed the case was blown out of proportion and that the charges were magnified. *Id.* at 85.

Because the trial court hears and sees testimony, it is in the best position to judge the sincerity of a defendant's purported remorsefulness. *Stout v. State*, 834 N.E.2d 707, 711 (Ind. Ct. App. 2005), *trans. denied*. Here, the trial court expressly rejected Morris's claim of remorse, explaining, "[O]f course today your [sic] saying your [sic] sorry. When I saw this pre-sentence report and read that last paragraph I thought the same thing, that you just didn't have a clue, that you your [sic] putting the blame on that she can consent to this as an eleven year old." *Id.* at 102. We discern no impermissible consideration in this case. Thus, the trial court did not abuse its discretion in failing to recognize remorse as a mitigating circumstance.

IV. Guilty Plea

Fourth, Morris argues that the trial court abused its discretion in failing to find in mitigation that he pled guilty. Our Supreme Court has held that "a defendant who pleads guilty deserves 'some' mitigating weight to be given to the plea in return." *Anglemyer v. State*, 875 N.E.2d 218, 220 (Ind. 2007) (citing *McElroy*, 865 N.E.2d at 591). The caveat, however, is that "an allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is not only supported by the record but also that the mitigating evidence is significant." *Id.* at 220-21. "[T]he significance of a guilty plea as a mitigating factor varies from case to case," and "a guilty plea may not be significantly mitigating when it does not demonstrate the defendant's acceptance of responsibility or when the defendant receives a substantial benefit in return for the plea." *Id.* at 221 (citations omitted).

Here, Morris received a very substantial benefit in return for his guilty plea. Specifically, in exchange for his guilty plea to one count, the State agreed to dismiss five felony charges: two counts of Class A felony child molesting, two counts of Class B sexual misconduct with a minor, and one count of Class D felony possession of child pornography. Plea Hrg. Tr. p. 3. Again, the court was only obliged to identify those circumstances that it found *significantly* mitigating. *Jackson*, 728 N.E.2d at 154. The trial court did not abuse its discretion in failing to recognize Morris's guilty plea as a significant mitigating factor. *Anglemyer*, 875 N.E.2d at 221.

V. Weighing of Aggravators and Mitigators

Fifth, Morris argues that the trial court erred in weighing the aggravating and mitigating circumstances. Other than his other challenges to the aggravators and significant mitigators identified by the trial court, which we have already concluded were valid sentencing considerations, the only argument Morris seems to advance in this regard on appeal is that his lack of criminal history should have been given more mitigating weight. Appellant's Br. p. 15.

A defendant's lack of criminal history is, as a general matter, a substantial mitigating circumstance. *Loveless v. State*, 642 N.E.2d 974, 976 (Ind. 1994) ("A lack of criminal history is generally recognized as a substantial mitigating factor."). Further, we have explained that the longer a defendant has lived without engaging in criminal activity, the more significant a lack of criminal history will often be when fashioning the defendant's sentence. *Rutherford v. State*, 866 N.E.2d 867, 874 (Ind. Ct. App. 2007); *Cloum v. State*, 779 N.E.2d 84, 91 (Ind. Ct. App. 2002).

Here, the record reflects that Morris had no criminal history prior to or separate from the offenses leading to his conviction. The trial court identified his lack of criminal history as a mitigating circumstance but found that the aggravating circumstances significantly outweighed it. Sent. Tr. p. 101. Morris admitted at his sentencing hearing that his sexual conduct with H.M. took place over a period of five years before he was caught, *id.* at 90, and he also testified that he had abused marijuana daily for twenty years without apprehension, *id.* One valid aggravating circumstance is sufficient to support an enhanced sentence. *Altes v. State*, 822 N.E.2d 1116, 1125 (Ind. Ct. App. 2005), *trans. denied*. In this case, the trial court identified several valid aggravating factors and only

one significant mitigating circumstance. Given Morris's admissions regarding other criminal activity, we cannot say that the trial court abused its discretion in weighing the aggravators more heavily than his lack of criminal history. We perceive no abuse of discretion in the trial court's weighing and balancing of aggravating and mitigating circumstances.

VI. Appropriateness of Sentence

Finally, Morris claims that his sentence is inappropriate pursuant to Indiana Appellate Rule 7(B). When challenging the appropriateness of a sentence under Appellate Rule 7(B), the defendant bears the burden of persuading us that the sentence is inappropriate "in light of the nature of the offense and the character of the offender." *Childress*, 848 N.E.2d at 1080 (citation omitted).

As an initial matter, we observe that Morris did not develop his Appellate Rule 7(B) argument in his appellate brief other than making passing reference to it twice. He makes no distinct argument regarding how his sentence is inappropriate in light of the nature of his offense or his character. *See* Appellant's Br. p. 12, 16. As such, he has waived this argument on appeal. *See* Ind. Appellate Rule 46(A)(8)(a).

Waiver notwithstanding, we conclude that Morris's forty-year sentence is not inappropriate. Regarding the nature of the offense, Morris began a sexual "relationship" with an eleven-year-old child who was the daughter of a girlfriend with whom he lived. He engaged his victim in vaginal, oral, and anal sex over a period of years, sometimes videotaping his actions. He provided skimpy outfits for the girl to wear and induced her to submit to the use of restraints and sex toys. Morris threatened to kill himself if she

told anyone about his actions and, on one occasion, even produced a noose. As for Morris's character, it is true that he had no criminal convictions prior to his conviction in this case. However, by his own admission, his offenses against H.M. continued over a period of five years before he was caught. Sent. Tr. p. 90. Morris also testified at his sentencing hearing that he smoked marijuana daily for twenty years and had offered it to H.M. *Id.* at 90-91. Morris's character does not render his forty-year sentence for Class A felony child molesting inappropriate.

Affirmed.

MAY, J., and MATHIAS, J., concur.